

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: THEEL, JULIE) Examiner: Hylinski, Alyssa
Serial No.: 10/668,049)
Filed: 09/22/2003) Art Unit: 3711
For: DISMEMBERABLE CANINE) Attorney Docket Number: 83359.0002
APPEASEMENT DEVICE AND)
METHOD)

REVISED APPEAL BRIEF

Board of Patent Appeals and Interferences
P.O. Box 1450
Alexandria, VA 22313-1450

The appeal brief was filed with small entity filing fee of \$270 per § 41.20(b)(2).

I. REAL PARTY IN INTEREST

The real party in interest is the inventor Julie Theel who is the sole and exclusive owner of the patent.

II. RELATED APPEALS AND INTERFERENCES

Currently, there are none.

III. STATUS OF CLAIMS ON APPEAL

(37 CFR 41.37(c)(1)(iii))

The applicant appeals final rejection of claims 21-30, 41-47 and 55-62, finally rejected in the final office action of January 6, 2009. Applicant prays for relief to the BPAI to allow Claims 21-30, 41-47 and 55-62.

Claims 1-20 are canceled.

Claims 21-30 stand finally rejected.

Claims 31-40 are withdrawn.

Claims 41-47 stand finally rejected.

Claims 48-54 are withdrawn.

Claims 55-62 stand finally rejected.

IV. STATUS OF AMENDMENTS AFTER FINAL
(37 CFR 41.37(c)(1)(iv))

There are no amendments made after final.

V. SUMMARY OF CLAIMED SUBJECT MATTER
(37 CFR 41.37(c)(1)(v))

The claimed subject matter involved in this appeal is embodied in the independent claims which are claims 21 and 41.

21. A pet toy device for a house pet, the device comprising:

a pet toy main member (element 160, page 2, line 19) having an exterior surface and one or more interface surfaces, (element 145,146, page 2, line 23) wherein the main member exterior surface is non-destructively gripable by a house pet using its mouth and paws, wherein the main member is adapted to teeth of a dog and to withstand biting, chewing, and rending, and wherein the pet toy main member is shaped and sized to prevent swallowing by a house pet; and

one or more pet toy secondary members, (elements 170 180 190, page 2, line 19) each pet toy secondary member having an exterior surface that is non-destructively gripable by a house pet using its mouth and paws; each pet toy secondary member further having an interface surface that corresponds to the main member interface surfaces, wherein the secondary members are adapted to teeth of a dog and to withstand biting, chewing, and rending, and wherein the pet toy secondary members are shaped and sized to prevent swallowing by a house pet; (page 2, line 7-13)

wherein the interface surfaces of the main member and the interface surfaces of the secondary members are attachable by a human to create an attached toy state, non-destructively detachable by a house pet using its mouth and paws to create a detached toy state, and repeatably reattachable by a human to recreate an attached toy state after being detached by a house pet;

thereby enabling a house pet to tear apart the main and secondary members of the toy by gripping the exterior surfaces of the toy with its paws and mouth, and subsequently enabling a human to easily reassemble the toy by reattaching the interface surfaces of the main member and secondary members. (page 2, line 2-6)

41. A pet toy device for a house pet, the device comprising:

a pet toy main member (element 160, page 2, line 19) having an exterior surface and one or more interface surfaces, (element 145, 146, page 2, line 23) wherein the main member exterior surface is non-destructively grippable by a house pet using its mouth and paws, wherein each of the main member interface surfaces includes a first portion of a snap connector, (page 2, line 25) wherein the main member is adapted to teeth of a dog and to withstand biting, chewing, and rending, and wherein the pet toy main member is shaped and sized to prevent swallowing by a house pet; and

one or more pet toy secondary members, (elements 170 180 190, page 2, line 19) each pet toy secondary member having an exterior surface that is non-destructively grippable by a house pet using its mouth and paws; each pet toy secondary member further having an interface surface that includes a second portion of a snap connector (page 2, line 25) that mateably corresponds to the first portion of the snap connector on each main member interface surface, wherein the secondary members are adapted to teeth of a dog and to withstand biting, chewing, and rending, and wherein the pet toy secondary members are shaped and sized to prevent swallowing by a house pet; (page 2, line 7-13)

wherein the interface surfaces of the main member and the interface surfaces of the secondary members are attachable by a human to create an attached toy state via the snap connectors, non-destructively detachable by a house pet using its mouth and paws to create a detached toy state by disconnecting the snap connectors, and repeatably reattachable by a human to recreate an attached toy state via the snap connectors after being detached by a house pet; thereby enabling a house pet to tear apart the main and secondary members of the toy by gripping the exterior surfaces of the toy with its paws and mouth, and subsequently enabling a human to easily reassemble the toy by reattaching the interface surfaces of the main member and secondary members. (page 2, line 2-6)

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The applicant appeals all claim rejections 35 USC § 103 of claims 21-30, 41-47 and 55-62.

- Applicant appeals examiner's rejection that Claims 21-30, 41-47 and 55-62 are rejected under 35 U.S.C. 103 over Shamitoff.

- Applicant appeals examiner's rejection that Claims 26 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shamitoff and Russel.
- Applicant appeals examiner's rejection that Claims 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shamitoff and Alonso 3,375,604.
- Applicant appeals examiner's rejection that Claims 30 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shamitoff and Essebaggers 5,108,100.

VII. ARGUMENT

A. Applicant appeals examiner's rejection that Claims 21-30, 41-47 and 55-62 are rejected under 35 U.S.C. 103 over Shamitoff.

As previously stated in the remarks of September 30, 2008, Shamitoff does not disclose a dog toy. The present invention is a dog toy. The Shamitoff reference would be totally changed in its principle of operation if it were to become a dog toy. According to the manual of patent examining procedure 2143.01 states that the proposed modification cannot change the principle of operation of a reference. The teachings and suggestions of the Shamitoff reference cannot be modified using another prior art reference to change the Shamitoff reference to disclose the claimed invention. Shamitoff further fails to teach in each and every element of the claims for the reasons stated above. The claim amendments are not vague. The main member and secondary members being adapted to teeth of a dog discloses a ruggedized dog toy having parts that cannot be swallowed, rather than the device of the Shamitoff reference.

The Shamitoff reference teaches a plurality of small detachable portions of the head such as eyes, ears, earrings, nose, mouth, mustache, beard and hair. (Shamitoff col. 5, line 5-8) It is common knowledge that items such as these small detachable portions are extremely small and easy to swallow by a common pet dog such as a Labrador Retriever. Thus, the Shamitoff reference teaches away from a pet toy.

The Shamitoff reference in combination with the other references does not teach a pet toy of the present invention with primary and secondary members that are nondestructively disassembled and re-combinable.

The supplemental declaration of Julie Theel provides secondary Graham factor evidence as to nonobviousness (Exhibit A). The Rule 1.132 affidavit of Julie Theel of May 20, 2002 in

United States application 10/154,127, now US Patent 6,623,328 should also be considered for secondary factors (Exhibit B).

B. Applicant appeals examiner's rejection that Claims 26 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shamitoff and Russell.

For the sake of brevity, but rejections of the independent claims were discussed in detail on the understanding that the dependent claims are also patently distinct over the prior art, as they did then directly from their restrictive independent claims. Nevertheless, but dependent claims include additional features that, in combination with those of the independent claims, provide further separate and independent basis for patentability.

Shamitoff fails to teach or suggest each and every element of claim 26 for the reasons stated above. While the Russell reference may disclose the additional limitation of claim 26, the Russell reference clearly does not supply the deficiencies of claim 21 set forth above. Accordingly, the applicant respectfully submits that claim 26 is patentable because claim 21 is patentable.

C. Applicant appeals examiner's rejection that Claims 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shamitoff and Alonso.

For the sake of brevity, but rejections of the independent claims were discussed in detail on the understanding that the dependent claims are also patently distinct over the prior art, as they did then directly from their restrictive independent claims. Nevertheless, but dependent claims include additional features that, in combination with those of the independent claims, provide further separate and independent basis for patentability.

Shamitoff fails to teach or suggest each and every element of claim 27 for the reasons stated above. While the Alonso reference may disclose the additional limitation of claim 26, the Alonso reference clearly does not supply the deficiencies of claim 21 set forth above. Accordingly, the applicant respectfully submits that claim 27 is patentable because claim 21 is patentable.

D. Applicant appeals examiner's rejection that Claims 30 is rejected under 35 U.S.C. 103(a) as being unpatentable over Shamitoff and Essebaggers 5,108,100.

For the sake of brevity, but rejections of the independent claims were discussed in detail on the understanding that the dependent claims are also patently distinct over the prior art, as they did then directly from their restrictive independent claims. Nevertheless, but dependent claims include additional features that, in combination with those of the independent claims, provide further separate and independent basis for patentability.

Shamitoff fails to teach or suggest each and every element of claim 30 for the reasons stated above. While the Essebaggars reference may disclose the additional limitation of claim 30, the Essebaggars reference clearly does not supply the deficiencies of claim 21 set forth above. Accordingly, the applicant respectfully submits that claim 30 is patentable because claim 21 is patentable.

Respectfully submitted for appellant,

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VIII. CLAIMS APPENDIX

21. A pet toy device for a house pet, the device comprising:

 a pet toy main member having an exterior surface and one or more interface surfaces, wherein the main member exterior surface is non-destructively gripable by a house pet using its mouth and paws, wherein the main member is adapted to teeth of a dog and to withstand biting, chewing, and rending, and wherein the pet toy main member is shaped and sized to prevent swallowing by a house pet; and

 one or more pet toy secondary members, each pet toy secondary member having an exterior surface that is non-destructively gripable by a house pet using its mouth and paws; each pet toy secondary member further having an interface surface that corresponds to the main member interface surfaces, wherein the secondary members are adapted to teeth of a dog and to withstand biting, chewing, and rending, and wherein the pet toy secondary members are shaped and sized to prevent swallowing by a house pet;

 wherein the interface surfaces of the main member and the interface surfaces of the secondary members are attachable by a human to create an attached toy state, non-destructively detachable by a house pet using its mouth and paws to create a detached toy state, and repeatably reattachable by a human to recreate an attached toy state after being detached by a house pet;

 thereby enabling a house pet to tear apart the main and secondary members of the toy by gripping the exterior surfaces of the toy with its paws and mouth, and subsequently enabling a human to easily reassemble the toy by reattaching the interface surfaces of the main member and secondary members.

22. The device of claim 21, wherein the house pet is a dog.

23. The device of claim 21, wherein the exterior surfaces of the pet toy main member and the pet toy secondary members are sufficiently durable to non-destructively withstand biting and chewing by a house pet.

24. The device of claim 21, wherein the interface surfaces of the main member and the interface surfaces of the secondary members are attached securely enough to require a substantial amount of force to detach the secondary members from the main member that a challenge is provided for a house pet.

25. The device of claim 21, wherein the pet toy is constructed from one or more materials selected from the group of denim, plush, corduroy, and rubber.
26. The device of claim 21, wherein the pet toy main member and the pet toy secondary members are attached at the interface surfaces using hook and loop tape.
27. The device of claim 21, wherein the pet toy main member and the pet toy secondary members are attached at the interface surfaces using magnets.
28. The device of claim 21, wherein the pet toy main member and the pet toy secondary members are attached at the interface surfaces using snaps, whereby the pet toy main member includes a protrusion at each interface surface that snaps into a mating socketed portion on an interface surface of each secondary member, thereby attaching the pet toy main member to the pet toy secondary members.
29. The device of claim 21, wherein the pet toy main member and the pet toy secondary members are attached at the interface surfaces using snaps, whereby the pet toy main member includes a socketed portion at each interface surface that snaps onto a mating protrusion on an interface surface of each secondary member, thereby attaching the pet toy main member to the pet toy secondary members.
30. The device of claim 21, further comprising a cord that connects the pet toy main member and the pet toy secondary members at the interfacing surfaces, wherein the cord is sized in length to allow the interface surfaces on the main member to separate from the interface surfaces on the secondary member while still remaining connected via the cord, and wherein the cord facilitates restoring the pet toy to the attached toy state after the main member and the secondary members have been detached from each other by a house pet.
41. A pet toy device for a house pet, the device comprising:
 - a pet toy main member having an exterior surface and one or more interface surfaces, wherein the main member exterior surface is non-destructively grippable by a house pet using its mouth and paws, wherein each of the main member interface surfaces includes a first portion of a snap connector, wherein the main member is adapted to teeth of a dog and to withstand biting, chewing, and rending, and wherein the pet toy main member is shaped and sized to prevent swallowing by a house pet; and
 - one or more pet toy secondary members, each pet toy secondary member having an exterior surface that is non-destructively grippable by a house pet using its mouth and paws; each

pet toy secondary member further having an interface surface that includes a second portion of a snap connector that mateably corresponds to the first portion of the snap connector on each main member interface surface, wherein the secondary members are adapted to teeth of a dog and to withstand biting, chewing, and rending, and wherein the pet toy secondary members are shaped and sized to prevent swallowing by a house pet;

wherein the interface surfaces of the main member and the interface surfaces of the secondary members are attachable by a human to create an attached toy state via the snap connectors, non-destructively detachable by a house pet using its mouth and paws to create a detached toy state by disconnecting the snap connectors, and repeatably reattachable by a human to recreate an attached toy state via the snap connectors after being detached by a house pet; thereby enabling a house pet to tear apart the main and secondary members of the toy by gripping the exterior surfaces of the toy with its paws and mouth, and subsequently enabling a human to easily reassemble the toy by reattaching the interface surfaces of the main member and secondary members.

42. The device of claim 41, wherein the house pet is a dog.
43. The device of claim 41, wherein the exterior surfaces of the pet toy main member and the pet toy secondary members are sufficiently durable to non-destructively withstand biting and chewing by a house pet.
44. The device of claim 41, wherein the interface surfaces of the main member and the interface surfaces of the secondary members are attached securely enough via the snap connectors to require a substantial amount of force to detach the secondary members from the main member that a challenge is provided for a house pet.
45. The device of claim 41, wherein the pet toy is constructed, at least in part, from rubber material.
46. The device of claim 41, wherein the first portion of a snap connector includes a protrusion, and the second portion of a snap connector includes a mating socketed portion, and wherein the first portion of the snap connector is shaped and sized to snap into the second portion of the snap connector, thereby attaching the pet toy main member to the pet toy secondary members.
47. The device of claim 41, wherein the first portion of a snap connector includes a socketed portion, and the second portion of a snap connector includes a mating protrusion, and wherein

the first portion of the snap connector is shaped and sized to snap onto the second portion of the snap connector, thereby attaching the pet toy main member to the pet toy secondary members.

55. The pet toy device for a house pet of claim 21, wherein the house pet is a large dog.

56. The pet toy device for a house pet of claim 55, wherein the pet toy device is constructed of a plastic material.

57. The pet toy device for a house pet of claim 56, wherein the plastic material is a vinyl material.

58. The pet toy device for a house pet of claim 56, wherein the plastic material is a polyethylene material.

59. The pet toy device for a house pet of claim 41, wherein the house pet is a large dog.

60. The pet toy device for a house pet of claim 59, wherein the pet toy device is constructed of a plastic material.

61. The pet toy device for a house pet of claim 60, wherein the plastic material is a vinyl material.

62. The pet toy device for a house pet of claim 60, wherein the plastic material is a polyethylene material.

IX. EVIDENCE APPENDIX

The evidence appendix consists of Exhibits A and B:

Exhibit A. The supplemental declaration of Julie Theel of August 28, 2009 which has the following subexhibits:

- Exhibit 1 The Purina Encyclopedia of Dog Care by Amy D. Shojai
- Exhibit 2 Vet on Call edited by Matthew Hoffman
- Exhibit 3 Fax from Aspen Pet re License Agreement
- Exhibit 4 Email from G. Hirschberg re marketing Julie Theel's toy
- Exhibit 5 Email from J. Rudalevige (Petco) re interest in product line
- Exhibit 6 Customer feedback
- Exhibit 7 Marketing Survey results (14)
- Exhibit 8 Rip Roarin' Fun-nies by Pet Generation flyer

Exhibit B. The Rule 1.132 affidavit of Julie Theel of May 20, 2002 in United States application 10/154,127, now US Patent 6,623,328.

X. RELATED PROCEEDINGS APPENDIX

There are no exhibits in the related proceedings appendix.

XI. JURISDICTIONAL STATEMENT

The Board has jurisdiction under 35 U.S.C. 134(a). On January 6, 2009 the Examiner mailed a final rejection setting a three-month shortened statutory period for response. The time for responding to the final rejection expired on April 6, 2009. Rule 134. A notice of appeal and a request for a three-month extension of time under Rule 136(a) was filed on July 3, 2009.

The time for filing an appeal brief is two months after the filing of a notice of appeal, Bd.R. 41.37(c). The time for filing an appeal brief expires September 3, 2009. The appeal brief has the filing date of August 28, 2009.

Respectfully submitted for appellant,

Dated: 12/22/2009

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